Safway Steel Products, Inc. *and* Local 2819, United Brotherhood of Carpenters and Joiners of America. Case 29–CA–22769

February 26, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 14, 2000, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below[1] and to adopt the recommended Order as modified.

AMENDED CONCLUSION OF LAW

Insert the following as Conclusion of Law 5.

"(5) By failing and refusing to implement the terms of the memorandum of agreement reached by the parties in May 1999, entitled, "Addendum Article J.#1, Benefit Funds" as further described above covering payments to the Union's trust fund for its bargaining unit employees, the Respondent violated Section 8(a)(1) and (5) of the Act."

AMENDED REMEDY

Substitute the following for the second paragraph.

"The Respondent shall execute the above-described addendum between itself and the Union and give effect to its provisions and pay to the Hollow Metal Trust Fund the amounts of increased contributions set forth in the addendum retroactive to January 1999, in accordance with the Board's decision in *Fox Painting Co.,* 263 NLRB 437 (1982), with any additional amount to be computed in accordance with the Board's decision in *Merryweather Optical Co.,* 240 NLRB 1213 (1979)."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Safway Steel Products, Inc., Brooklyn, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Failing and refusing to execute and implement the addendum to the contract between itself and the New York City Industrial Council of Carpenters, Local Union 2819, United Brotherhood of Carpenters and Joiners of America entitled "Addendum Article J.#1. Benefit Funds" embodying the terms of an agreement reached in May 1999."

2. Substitute the following for paragraph 2(b).

"(b) Upon the execution of the Addendum, give retroactive effect and implement its provisions and pay to the Hollow Fund Metal Trust Fund the amounts of increased contributions as set forth in the Addendum, with interest retroactive to January 1999."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to execute or implement the Addendum to the contract between us and the New York City Industrial Council of Carpenters, Local Union 2819, United Brotherhood of Carpenters and Joiners of America entitled, "Addendum Article J.#1. Benefit Funds" embodying the terms of an agreement reached in May 1999.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith execute and implement the addendum to the contract between us and the Union entitled "Addendum Article J.#1. Benefit Funds" embodying the terms of an agreement reached in May 1999.

WE WILL on the execution of the Addendum, give effect to its provisions and pay to the Hollow Metal Trust Fund the amounts of increased contributions set forth in the Addendum retroactive to January 1999.

SAFWAY STEEL PRODUCTS, INC.

David Pollack, Esq., for the General Counsel.
Thomas Bianco, Esq. (Kaufman, Schneider & Bianco), of Jericho, New York, for the Respondent.
Wendell Shepherd, Esq. (Roy Barnes, P.C.), of Elmsford, New York, for the Union.

[1] We find merit in the General Counsel's limited exceptions to the judge's failure to include a consistent provision in his conclusions of law, remedy, Order, and notice that the Respondent implement the agreement reached by the parties in May 1999, retroactively to January 1999, and that payment of funds into the Union's trust fund should also be retroactive to that date. Therefore, the conclusion of law, remedy, Order, and notice are modified accordingly.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed on May 28 and August 23, 1999, respectively, by Local 2819, United Brotherhood of Carpenters and Joiners of America (Union) a complaint was issued against Safway Steel Products, Inc. (Respondent) on August 25, 1999.[1]

The complaint alleges essentially that during negotiations pursuant to a reopening of the parties' collective-bargaining contract to consider an increase in welfare fund benefits, a complete agreement was reached on an increase in welfare costs for unit employees. The complaint further alleges that the Union requested that Respondent execute a memorandum of agreement containing that agreement but it has refused to do so, and has also refused to abide by the terms of that agreement, all in violation of Section 8(a)(1) and (5) of the Act.

Respondent's answer denied the material allegations of the complaint and asserted 2 affirmative defenses, which will be discussed, infra. On January 19, 1999, a hearing was held before me in Brooklyn, New York. On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having its principal office and place of business located at 370 Greenpoint Avenue, Brooklyn, New York, has been engaged in the renting, erecting and dismantling of scaffolding, and sidewalk bridging. During the past year, Respondent has purchased and received at its facility, goods and materials valued in excess of $50,000 directly from entities located outside New York State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 2819, United Brotherhood of Carpenters and Joiners of America, is affiliated with the New York City Industrial Council of Carpenters (Council). Jose Rivera, the president of Local 2819 and the vice president of the Council, negotiated the last 3 collective-bargaining agreements with Respondent. He has personally been involved in representing Respondent's employees for the past 25 years. The most recent contract between the parties runs from December 1994, through November 1999. It was between Respondent and the New York City Industrial Council of Carpenters, Local 2819. Respondent stipulated that during the term of the contract, the Council was the Section 9(a) exclusive collective-bargaining representative of the employees in the unit set forth in the contract. Respondent's answer admits that it has recognized the Council as such representative, and that Rivera is an agent of the Council.

Based on the above, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Agreement

The Union represents 25 to 30 employees in a contractual unit, which includes "all workers in the employer's yard operation excluding guards, supervisors, and clerical workers." It was stipulated that such unit is an appropriate collective-bargaining unit.

The parties' 1994 to 1999 contract contained the following term in Article J (1) Benefit Funds, which relates to contributions to the Hollow Metal Trust Fund:

> The Company agrees to re-open negotiations on July 1, 1998 to discuss any welfare cost increases and the union agrees not to strike.

Union President Rivera testified that about 1 week before Christmas 1998, accompanied by Shop Steward Joseph Calandra, he met with Respondent's branch manager, Salvatore Impieri, at Respondent's premises. They discussed certain unspecified matters, and as Rivera was leaving, he told Impieri that they had to "reopen the contract", but that he would not make any increase retroactive to July 1, 1998, thereby saving the Company money.

According to Rivera, Impieri replied that he understood that they were supposed to reopen the contract. Rivera then said that he (Rivera) would consult with his office because he did not know how much of an increase to the welfare fund was needed, and would then contact Impieri.

Calandra testified that as he and Rivera were leaving Impieri's office, Rivera asked Impieri when they were going to "settle" the welfare fund matter. Impieri replied "soon we'll take care of it."

Rivera testified that thereafter, in early February 1999, he met with Charles Claytor, the president of the Council and chairman of the board of the trust fund. At their meeting, Rivera asked him how much of an increase in welfare funds was needed. Claytor reviewed Respondent's collective-bargaining agreement, which stated that the contribution was then $2.32 per hour, and told him that a 50-cent-per-hour increase was necessary.

Rivera stated that in about mid or late February, about 2 weeks after his meeting with Claytor, he returned to Respondent's premises and met with Impieri. According to Rivera, he told Impieri that the Union needed a 50-cent increase in the welfare fund. Impieri asked whether Rivera knew how much money Respondent had already paid into the Union's benefit funds, and mentioned a particular figure. Rivera asked whether Impieri knew how much money the Union paid to its members, adding that he still needed the 50-cent increase. Impieri answered that he would "look into it."

Rivera further testified that about 3 weeks later, in mid-March, he returned to Respondent's premises and was told by Impieri that Respondent would agree to give a 25-cent increase to the welfare fund. Rivera replied that he would check with his people to see if that was acceptable.

[1] A notice of intention to amend complaint was issued on January 6, 2000 by General Counsel but at the hearing that notice was effectively withdrawn when certain issues were resolved by stipulation of the parties.

Rivera reported to Claytor that Respondent offered 25 cents, effective January 1, 1999. Claytor replied that that amount was not sufficient and that 50 cents was required. Rivera asked him whether the following was acceptable: 25 cents effective January 1, 1999, and an additional 25 cents effective July 1, 1999. Claytor responded that that would be acceptable.

Rivera stated that a few weeks later, in late April or early May, he met with Impieri at the shop and told him that the Union needed a 50-cent increase. Rivera told him that the Union would accept such an increase in 2 increments: a 25-cent raise, effective January 1, 1999, and an additional 25-cent increase, effective July 1, 1999.

Rivera first testified that Impieri said that he would let Rivera know in 1 week. Rivera left and returned to the shop in 1 week and was told that, "it can be done, we'll agree to it." Rivera said that he would draft the addendum and present it for his signature. Impieri said, "fine". They shook hands and Rivera left.

Rivera testified on cross examination, however, that at this meeting after telling Impieri that the Union would accept two 25-cent increases, Impieri immediately agreed, saying "it's doable." Rivera interpreted that expression as Impieri's agreement to the Union's terms. Rivera told him that he would draft the addendum.

As he was leaving the building, Rivera told Steward Calandra that Impieri agreed to a 50-cent increase in the welfare fund.

Calandra corroborated Rivera's testimony. He testified that in early May he met Rivera as he was leaving the building and was told that "it is settled. We got the 50 cents for the health and welfare fund." Calandra replied "good. It's over." Calandra stated that that day he advised his coworkers that Rivera told him that the welfare fund matter was settled and that they should tell their fellow employees.

About 1 week later, on about May 17, Rivera typed and mailed to Impieri the following addendum to the contract:

> It is agreed by all parties that notwithstanding the language in the Agreement dated December 1, 1994, the payments to the Welfare Fund shall be increased as follows:
>
> Effective January 1, 1999…$2.57 per hour on each employee.
> Effective July 1, 1999……..$2.82 per hour on each employee.

The addendum had a place for signatures of Respondent and the Union.

B. The Altercation

On May 18, steward Calandra received a warning letter from Respondent's supervisor Steve Mullin. The letter concerned damage sustained on May 13, to a forklift which Calandra was allegedly operating. The letter advised that further abuse of equipment would result in his suspension.

Calandra called Rivera that day, notifying him of the warning letter. Rivera visited Respondent's premises the following day, May 19, in order to discuss the matter.

Impieri and Supervisor Mullin met with Calandra and Rivera. Impieri testified that during the discussion of the letter Rivera presented a petition to Impieri, which stated that the yard was unsafe. The petition was signed by Respondent's employees. Impieri stated that Rivera was very confrontational, placing the petition directly in front of and very close to his (Impieri's) face. The dispute escalated and Impieri and Mullin became angry at the "untrue" allegation that the yard was unsafe. Mullin positioned himself very close to Rivera, Impieri cursed at Rivera, and Impieri "threw" Rivera and Calandra out of his office.

Rodney Brooks, Respondent's northeast regional manager and Impieri's immediate supervisor, testified that Impieri had phoned him and mentioned that he was having problems with the facility including damage being done to equipment, and he (Impieri) believed that the employees were abusing company property which was beginning to cost a lot of money.

Brooks further testified that on the day of the confrontation, Impieri called and told him what happened at the "very heated" meeting, and stated that Rivera was "coming and going sort of unannounced" in and out of the building. Impieri asked whether it was reasonable to require that Rivera give advanced notice of his visits to Respondent's premises. Brooks said that such an approach was reasonable since Impieri had a business to run, and because of safety issues. Brooks suggested that Impieri send a letter to Rivera.

C. Later Events Concerning the Increase in Welfare Payments

About 1 or 2 days after the altercation Impieri received the above contract addendum. Impieri testified that he was very upset because he never agreed to "anything like it." He stated that he called Brooks and told him that he advised Rivera that he would "look into" the matter, but he had never agreed to any such increase.

Brooks contradicted that testimony, stating that following his conversation with Impieri concerning the confrontation Impieri did not contact him regarding correspondence he received from Rivera. Brooks denied seeing the addendum, and could not recall any discussion with Impieri concerning its contents.

On May 21, Impieri sent two letters to Rivera. One stated:

> Unfortunately we cannot honor the Benefit Fund increase at this time. Our contract states "Article J" that the company agrees to re-open negotiations on July 1, 1998 to discuss any welfare cost increases and the union agrees not to strike.
> It is now May, 1999 and we cannot, at this time, afford the additional costs.
>
> The enclosed addendum is being returned to you unsigned.

In the second letter, Impieri wrote that the contract's language which stated that the union representative shall have access to the shop at all times was "disruptive to our business, especially when the meetings are held with the men while they are serving customers. I strongly recommend that you call me or Steve prior to scheduling any meetings with the men and that you schedule these appointments during the men's breaks … and/or at lunch."

As set forth above, on May 28, the original charge in this proceeding was filed.[2]

[2] The charge alleged that (a) on May 19, Respondent refused to bargain with Rivera over a grievance; (b) on May 25, Respondent refused to sign a memorandum of agreement containing contract terms agreed

D. The Testimony of Charles Claytor

Claytor testified that he spoke twice to Rivera concerning increases to Respondent's welfare fund contributions.

On the first occasion, in early or mid December 1998, Rivera reported that Respondent offered an additional 25-cents-per-hour to the welfare fund. Claytor told Rivera that that amount was not acceptable as it was less than other employers were paying who received the same benefit.

Their second meeting occurred in late December 1998 or January 1999. Rivera asked him whether a total of 50 cents would be acceptable if he could get 25 cents retroactive to January and an additional 25 cents. Claytor replied that that arrangement would be acceptable.

E. The Testimony of Respondent's Witnesses

Impieri has been the branch manager of Respondent's Brooklyn location since October 1994. He is responsible for the day-to-day operations of the branch, including supervising sales contracts with customers.

Impieri hires employees who work as carpenters and laborers. However, in order to hire salaried employees he is required to send an employee requisition form to the Milwaukee, Wisconsin home office of Respondent. Regional Manager Brooks testified that Impieri could hire certain classifications of employees on his own. If there is a need to hire 2 or 3 laborers he can do so. As to others, he has to ask for permission or have Brooks make the decision.

Brooks answered several hypothetical questions concerning Impieri's authority over employees. Brooks stated that Impieri could not suspend an employee for 3 days without conferring with him. If Impieri informed Brooks that documentation had been made that the employee had been repeatedly warned for chronic lateness, Brooks would give Impieri permission to suspend him. If the Union protests the discipline, and Impieri agrees to a reduction to a 1-day suspension, Impieri could do that on his own but Brooks would "hope" that Impieri would confer with him before doing so. If he did not, however, and Brooks learned that such an agreement was made, he would have no objection.

With respect to discharges of employees, Brooks stated that depending on the job title of the employee, Brooks would or would not ask to become involved in the process. However, he is kept informed of human resources decisions made by Impieri.

Brooks and Impieri confer with the home office before executing commercial contracts containing provisions regarding indemnification and subjugation. However, Impieri has the authority to approve a sale of scaffolding up to $100,000.

Impieri stated that any increases in costs, such as the hire of employees and the purchase of a large truck or forklift must be "justified" to the home office. Before terminating any employee he must confer with Regional Manager Brooks.

Impieri testified that he could not recall having a discussion with Rivera in December 1998, concerning increases to the welfare fund. He stated that he was on vacation from December 5th through December 14th. Further, Impieri stated that during the period July 1998 through May 1999, he met with Rivera only three or four times during which they discussed discharges of employees. Impieri saw Rivera only one additional time during that period when Rivera asked for a welfare fund increase. Impieri specifically denied seeing Rivera in December 1998, or in January, February, or March 1999. He also testified that if Rivera visited the shop to speak with employees, he would not have been notified of such an occurrence.[3]

Impieri stated that Rivera discussed the welfare fund increase matter with him only once, in late April or early May, about 2 to 3 weeks before their altercation on May 19. At that time, Rivera told him that they should have been discussing an increase in the welfare fund contributions in 1998, but in any event, he needed a 25-cent increase in the welfare fund. Impieri replied that Respondent could not afford an increase in such payments, and that nevertheless this matter should be discussed when they negotiated their new agreement in December.

Impieri admitted telling Rivera that he would "look into it," and Rivera told him that he would speak with Claytor. At hearing, Impieri stated that "looking into it" would have meant contacting Respondent's home office and discussing the matter with his supervisors, determining how many employees were involved, and analyzing the costs and the impact of an increase on the facility and the Respondent itself. At hearing, Impieri conceded that he did not look into the matter.

Impieri denied that he made any agreement with Rivera, or that there was any conversation in which an agreement was made. He also denied that Rivera said he would send a stipulation memorializing the terms of their alleged agreement. The farthest Impieri went was telling Rivera that he would look into the matter. He further denied speaking to Rivera about this issue in December, February, or March.

Impieri testified that assuming his work force of 30 employees worked a normal 40-hour workweek, their total weekly hours would be 1200. He further assumed that if they worked 50 weeks per year their total number of hours worked would be 60,000. That amount multiplied by the 25-cents-per-hour welfare contribution allegedly agreed to would equal $15,000 per year. Impieri further stated that that figure represented straight time worked, but that his employees worked much overtime so that figure would be higher. He further extrapolated that a 50-cent total contribution, which he allegedly agreed on, would result in an outlay of $30,000 without the addition of overtime hours worked.

Impieri stated that he did not have authority to agree to such an expenditure. Rather, he would have to check with Respondent's home office. He stated that he had no contact with the home office before receiving the addendum to the contract.

to between the parties; and (c) on May 25, Respondent unilaterally restricted the access of union representatives to its premises.

Only the issue set forth in (b) is before me. The amended charge filed on August 23 contains only the allegations set forth in the complaint.

[3] In contrast, Rivera testified that he visited Respondent's premises at least once per month during which he also discussed with Impieri any problems in the shop. Steward Calandra corroborated that Rivera visits the shop about once per month.

The 1994 collective-bargaining agreement was negotiated and signed on behalf of Respondent by Impieri and Art Young, Respondent's human resources director whose office was in the Milwaukee home office.[4] In preparing for and conducting those negotiations, the home office performed the cost analysis and prepared documents and spreadsheets. Those documents were then reviewed by Impieri, Young, and Don Bovre, the current director of human resources. When the draft contract was agreed to, the final document was prepared at Respondent's home office, Bovre signed it and it was sent to New York where Impieri signed it and sent it to Rivera.

Brooks testified that if Impieri had approved an increase in costs in a collective-bargaining agreement or approved a change in the contract's terms without consulting with Brooks or the home office, Brooks would consider that a "very big problem" which could result in his (Impieri's) termination. He stated that Impieri's signing the contract's addendum tendered by Rivera or even his oral agreement to that addendum, were outside Impieri's "realm of authority" because all union issues were outside the authority of Impieri and Brooks. All matters relating to collective-bargaining agreements and their terms must be approved by Respondent's human resources director and the vice president of branch operations.

Impieri stated that he could not, on his own, have agreed to the increases to which Rivera stated he agreed. In order to do so, he would have had to call Brooks for approval, which he had not done.

The current negotiations for a renewal contract are being negotiated on behalf of Respondent by Impieri, Brooks, and Bovre. Each negotiation session is attended by Bovre who is from Respondent's home office. Brooks stated that although he is involved with collective-bargaining negotiations, nearly all, if not all authority remains with the corporate human resources office. The reason for this policy is that of the 50 branch facilities of Respondent, 35 to 40 have collective-bargaining agreements with unions, and accordingly negotiations are "centralized" through the human resources office.

III. ANALYSIS AND DISCUSSION

A. Respondent's Affirmative Defenses

Respondent's answer asserts two affirmative defenses. First, it alleges that the complaint in this proceeding is barred by Section 10(b) of the Act. Second, it is alleged that, assuming that the Union first requested that Respondent bargain in December 1998, the Union waived its right to reopen negotiations by waiting nearly 6 months, from July 1998 before approaching Respondent with its request to reopen negotiations.

Section 10(b) of the Act provides in relevant part:

> No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

The 6-month period within which a charge must be filed begins to run when a party refuses to execute a contract. *Stanford Realty Associates*, 306 NLRB 1061, 1065 (1992); *Chambersburg County Market*, 293 NLRB 654, 655 (1989).

As set forth above, Respondent first refused to execute the addendum to the contract by its letter dated May 21, 1999. The original charge, which alleged that Respondent refused to sign the addendum, was filed on May 28, 7 days after Respondent's refusal to sign the addendum. Accordingly, I find that the charge was timely filed, and that the complaint's allegations are not barred by Section 10(b) of the Act.

Respondent argues that the Union waived its right to bargain about an increase in welfare contributions because it waited too long in raising the issue.

Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." Those are mandatory subjects of bargaining. Specifically, the making of contributions to benefit funds is a mandatory subject of collective bargaining. *Stevens & Associates Construction Co*., 307 NLRB 1403 (1992).

"The Board requires that a waiver of bargaining rights under Section 8(a)(5) not be lightly inferred but must be clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). *Colorado-Ute Electric Assn*., 295 NLRB 607, 609 (1989). I cannot find that the Union's delay in requesting bargaining over an increase in the welfare fund contributions constituted a waiver of its right to bargain. "The Union's behavior, although lax, did not amount to conduct, either standing alone or in concert with any other factors, which constituted a clear and unmistakable intent to waive any pertinent rights". *E-Systems, Inc*., 318 NLRB 1009, 1012 (1995).

In addition, I cannot find that Respondent has suffered any prejudice from the Union's failure to request bargaining in a more timely fashion. *Stanford Realty Associates*, supra at 1065. Indeed, although the Union possessed a contractual right to reopen negotiations on July 1, 1998, its delay until December 1998 in reopening negotiations and its ultimate agreement to have the increased contributions begin on January 1, 1999, actually resulted in a 6-month period of time, from July 1 to January 1, within which the Respondent did not have to pay any increased welfare contributions.

I accordingly find no merit in Respondent's affirmative defenses.

B. The Agreement

Section 8(d) of the Act requires that parties bargain in good faith and execute "a written contract incorporating any agreement reached if requested by either party." An employer violates Section 8(a)(1) and (5) of the Act by refusing to execute a written contract incorporating the terms of an agreement reached with a union representing its employees. *H.J. Heinz Co. v. NLRB,* 311 U.S. 514, 525–526 (1941).

The main issue is whether there was a meeting of the minds and whether the parties reached an agreement on the issue of an increase in the welfare fund contribution. *Canyon Coals*, 316 NLRB 448, 452 (1995). The burden of proof on the issue of whether the requisite meeting of the minds occurred is on the

[4] Respondent was also represented by Young in the negotiations for the predecessor contract to the 1994 agreement.

General Counsel. *New Orleans Stevedoring Co*., 308 NLRB 1076, 1081 (1992). While the technical rules of contract law are not necessarily controlling in labor relations negotiations, the normal rules of offer and acceptance in contract law are applicable to determine whether an agreement was reached. An offer can be accepted and the parties bound without the agreement being reduced to writing and signed. *Kasser Distiller Products*, 307 NLRB 899, 903 (1992).

I believe that the evidence establishes that an agreement was reached between Rivera and Impieri that the welfare fund contribution would be increased by 25 cents on January 1, 1999, and by an additional 25 cents on July 1, 1999.

Thus, Rivera, whose testimony I credit, first raised the issue of reopening the contract with Impieri in December 1998. His testimony in this regard was corroborated by Steward Calandra. I cannot credit Impieri who denied that this meeting occurred because he was on vacation in December. Accordingly, Rivera stated that he met with Impieri about 1 week before Christmas, which would be on about December 18. Impieri said that he was on vacation from December 5th through December 14th. Thus, Impieri apparently was available to have met with Rivera the week before Christmas.

Rivera testified that he met with Council official Claytor and learned that the fund needed a 50-cent increase in contributions, then met with Impieri in mid or late February and told him that a 50-cent raise was required. At that time Impieri told Rivera that he would "look into it." In mid-March, Rivera was told by Impieri that Respondent agreed to one 25-cent increase. Rivera returned to Claytor and they agreed that two increases of 25 cents each—one effective in January and the other in July 1999 would be acceptable if Respondent consented to those terms. Rivera then met with Impieri and was told that Respondent agreed to those terms. Rivera immediately told Calandra that Impieri agreed to a 50-cent increase. Calandra corroborated Rivera's testimony.

Claytor, in agreement with Rivera, stated that he met with Rivera twice concerning this matter. I credit Rivera notwithstanding that the dates of his meetings with Claytor differed from Claytor's recollection. Thus, Rivera testified that he met with Claytor in February and March or April. Claytor stated that their first meeting was in December and the other in December or January. Obviously, Claytor is mistaken about the date of his second meeting with Rivera.

Respondent argues that the confusion over the dates of the meetings between Rivera and Claytor compels a conclusion that the meetings did not occur. I do not agree.

Thus, Claytor stated that his first meeting with Rivera was in December 1998 at which Rivera told him that Respondent offered a 25-cent-per-hour increase. However, Rivera stated that it was not until mid March that such an offer was made.[5]

As set forth above, Claytor stated that his second meeting with Rivera occurred in late December 1998, or early January 1999, at which they agreed that two 25-cent increases would be acceptable to the Union if agreed to by the Respondent. However, Rivera stated that such a meeting occurred in late April or early May.

There was clearly confusion between the versions concerning the dates of the meetings between Claytor and Rivera. However, uncertainty as to the dates the meetings occurred does not alter the fact that the meetings took place and that the content of the meetings coincided. Thus, Rivera and Claytor consistently testified that at one meeting between them, Rivera reported that Impieri offered a 25-cent raise, and that at the next meeting they agreed that two 25-cent increases would be acceptable to the Union.

Respondent argues that the fact that Calandra was not aware of Rivera's meetings with Impieri proves that they did not occur. Calandra testified that he spoke with Rivera twice, in December and May concerning the health and welfare fund, and that he was not aware that "incremental" meetings had occurred between Rivera and Impieri.

Respondent points to Rivera's lack of written notes of the meetings with Impieri as evidence that the meetings did not occur. I do not agree. Apparently it was not Rivera's practice to keep notes of these brief, informal meetings although he did make notes when he engaged in extended collective-bargaining negotiations. Respondent further faults Rivera for not sending a letter confirming his agreement with Impieri, arguing that a confirming letter is a standard business practice. However, Rivera sent the addendum shortly after an agreement was reached. The addendum served, in effect, as a confirming letter.

Respondent also contends that no agreement was reached between Rivera and Impieri even accepting Rivera's testimony. Thus Respondent argues that Rivera's testimony is unreliable, pointing to Rivera's two versions of the critical meeting with Impieri in late April or early May in which Impieri agreed to two 25-cent increases in welfare contributions. As set forth above, Rivera first testified that following his demand for two 25-cent raises, Impieri said he would let Rivera know in one week, and thereafter accepted the demand. Rivera then testified that Impieri immediately accepted the offer when presented.

This slight variation in Rivera's testimony is not fatal to his credibility. The most important consideration is that the crucial part of Rivera's testimony was consistent—that Impieri agreed to the Union's demand of two 25-cent increases. Whether that agreement was separated from the demand by 1 week or not is not of critical importance.

Impieri's letter to Rivera on receiving the addendum provides support for a finding that agreement was reached. Thus, the letter states that Respondent "cannot honor the Benefit Fund increase at this time." The letter further states that "we cannot, at this time, afford the additional costs." The letter makes no reference to there not having been an agreement and does not question the basis for the increases. In fact it implies that agreement was reached as to an increase but that Respondent has chosen not to honor such an increase due to financial considerations.

[5] Respondent's brief erroneously states that at that meeting, Rivera reported that Impieri proposed two 25-cent increases. However, Claytor's testimony is that Impieri was referring to an offer of one 25-cent increase at that time. "At that time, he said that the company had offered 25 cents an hour, an additional 25 cents an hour in the welfare fund." In such testimony, Claytor clarified that he was referring to one additional 25-cent-per-hour increase.

In addition, although Impieri admittedly told Rivera in late April or early May that Respondent could not afford the increase and that discussions concerning a raise should take place in December in negotiations for a new contract, Impieri conceded that he also told Rivera that he would "look into it" and that Rivera told him that he would contact Claytor. Why would Impieri agree to look into the matter if he had determined that Respondent could not afford the increase demanded and that such negotiations were better left to full contract negotiations 7 or 8 months later?

The fact that Impieri told Rivera that he would look into it and that Rivera told him that he would speak to Claytor supports a finding that there was some movement toward negotiation. Impieri did not make an outright refusal to discuss the matter or consider it.

I cannot credit Impieri's denial that agreement was reached with Rivera. His credibility is harmed in the following respects. There was a direct contradiction between his testimony that when he received the addendum he told Brooks that he had not agreed to its terms, and Brooks' testimony that he had no discussion about that matter with him.

Further, in an effort to prove that he could not have met with Rivera four or five times as testified by Rivera, Impieri testified that Rivera rarely visited the shop, that in a 10-month period he had met with Rivera only three to five times, and that he would have been aware if Rivera had been at the shop more frequently to speak with employees. This is contradicted by Brooks' testimony that Impieri told him that Rivera was "coming and going" into and out of the facility unannounced, and wanted to inform Rivera that he must give advanced notice of his visits. Impieri's letter of May 21 also contradicted his testimony. In that letter, Impieri advised Rivera that the contract's language giving the Union representative access at all times was disruptive to the business particularly where meetings were held with employees while they served customers. The letter advised that Rivera call him prior to scheduling any meetings and that such meetings be held during nonwork time.

Two possible explanations exist for Impieri's denial that an agreement was reached. Immediately following the final meeting at which I find that Impieri agreed on the terms of the welfare fund increase, a heated exchange took place in his office which was ended when Impieri threw Rivera out. In those circumstances, especially when the addendum was received by Impieri only days after the confrontation, it is apparent that Impieri would not want to acknowledge that he reached agreement on an increase in the union welfare fund. Also, at the hearing, Impieri's supervisor, Brooks, testified that if Impieri made such an agreement it may be grounds for discharge. Understandably, when Impieri became aware that he had erred in agreeing to the increase he could acknowledge that he had made such an agreement only on risk of being terminated.

I find that Rivera and Impieri reached agreement on the terms of a welfare fund increase. The evidence compels the conclusion that Impieri agreed to two 25-cent raises in the welfare fund. They shook hands on the deal. *Sands Hotel & Casino*, 324 NLRB 1101, 1108 (1997). In sum, I believe that the facts establish an "explicit, forthright demonstration of acceptance and approval" of an agreement to increase the welfare fund contributions. *Alameda County Assn.*, 255 NLRB 603, 605 (1981).

C. Impieri's Authority to Negotiate and Agree

Respondent argues that even assuming an agreement was reached Impieri had no authority to bind Respondent to that agreement.

As set forth above, there was testimony by Brooks that Impieri did not have authority to negotiate the welfare fund increase with Rivera. Respondent argues that Impieri lacked authority to bind Respondent to the terms of the addendum, and that Rivera knew that Impieri lacked such authority and could not agree to its terms without the approval of the home office.

There was evidence that a representative of Respondent's home office had always been present with the local branch manager during collective-bargaining negotiations. Respondent states that inasmuch as Rivera acknowledged that he bargained, in the past, with a member of the home office in addition to the local branch manager, in this case Impieri, Rivera must have known that Impieri's authority was limited.

Respondent also argues that Rivera had a duty to inquire about Impieri's authority to negotiate the welfare fund increases.

"The law is clear that when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *Sands Hotel & Casino*, supra at 1108; *University of Bridgeport*, 229 NLRB 1074 (1977).

Here, I have found that Rivera and Impieri reached agreement on the terms of a welfare fund increase. It was incumbent on Impieri to advise Rivera that he had no authority to participate in the reopened negotiations for the welfare fund increase without the participation of Respondent's home office. "If the necessity for an employer's approval of an agreement made by its agent is not clearly understood, the employer's refusal to sign the agreement is unlawful." *Sands Hotel & Casino*, supra at 1109.

Impieri never expressed to Rivera at any time during their meetings that his authority was limited in any manner or that he needed prior approval from the home office before agreeing to any terms. I find that he reached agreement with Rivera before any restrictions on Impieri's authority were made known to the Union. *New Orleans Stevedoring Co*., 308 NLRB 1076, 1081–1082 (1992).

The fact that a home office representative had been present during negotiations with Impieri in the past does not mean that the Union was thereby placed on notice that negotiations without the home office representative were a nullity. There was no evidence that Rivera was told that the home office negotiator was required for negotiations. Indeed, the fact that Impieri admittedly told Rivera that he would "look into it", and as I find, thereafter made an offer of 25 cents and a later agreement to two 25-cent increases, is compelling evidence that he sought and obtained the approval of the home office for the increases. Impieri's definition of "looking into it" meant discussing with the home office the terms. In any event, viewed from Rivera's perspective, Impieri said that he would look into the matter and then agreed to the terms of the increase. Under these circum-

stances, Rivera was led to conclude that Impieri received authorization to negotiate and agree. *Niagara Therapy Mfg. Corp*., 237 NLRB 1, 4 (1978). See *Walnut Hill Convalescent Center*, 260 NLRB 258, 264 (1982).[6]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. New York City Industrial Council of Carpenters, Local Union 2819, United Brotherhood of Carpenters and Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative for purposes of collective-bargaining of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act: "All workers in the employer's yard operation excluding guards, supervisors, and clerical workers."

4. By failing and refusing to execute a written memorandum of agreement, which is an addendum to the contract between itself and the Union entitled "Addendum Article J. #1. Benefit Funds" embodying the terms of an agreement reached in about mid May 1999, covering the bargaining unit employees described above, Respondent violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to execute the above-described addendum between itself and the Union. In addition, I shall recommend that, upon execution of the addendum, Respondent give effect to its provisions and shall pay to the Hollow Metal Trust Fund the amounts of increased contributions set forth in the addendum, in accordance with the Board's decision in *Fox Painting Co*., 263 NLRB 437 (1982), with any additional amount to be computed in accordance with the Board's decision in *Merryweather Optical C*o., 240 NLRB 1213 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Safway Steel Products, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the addendum to the contract between itself and the New York City Industrial Council of Carpenters, Local Union 2819, United Brotherhood of Carpenters and Joiners of America entitled "Addendum Article J. #1. Benefit Funds" embodying the terms of an agreement reached in about mid May 1999.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith execute the addendum to the contract between itself and the Union entitled "Addendum Article J. #1. Benefit Funds" embodying the terms of an agreement reached in about mid May 1999.

(b) On the execution of the aforesaid Addendum, give effect to its provisions and pay to the Hollow Metal Trust Fund the amounts of increased contributions set forth in the Addendum, with interest.

(c) Within 14 days after service by the Region, post at its facility in Brooklyn, New York copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

---

[6] Steward Calandra's testimony that he believed that Rivera was negotiating with the home office is of no moment inasmuch as Calandra was not present during any of the meetings.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."